

90-207^①
No.

Supreme Court, U.S.
FILED

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JOSEPH F. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1990

BRUCE BALL and BEVERLY BALL; ALVIN LLOYD BARTLETT, JR. and PATRICIA BARTLETT; HARRY ART BRUTCHER and COLLEEN BRUTCHER; STEVEN BRUTCHER and GLADYS BRUTCHER; FRED W. BUFFHAM and SANDRA BUFFHAM; DONALD G. BURDICK; GORDON F. CASEY and JOANNE CASEY; JEANETTE KOSTURIK, as Administratrix of the Estate of Mary Chmielewski, Deceased; JOHN F. COUGHLIN, SR. and LORRAINE COUGHLIN; KATHY FAZEKAS and KEITH FAZEKAS; RAYMOND GUILLES; KARL W. HERSHEY and SHARON HERSHEY; DAVID P. HILFIKER and LAURIE HILFIKER; THOMAS HODSON and JUDY MAE HODSON; FRANK G. JOHNSON and BARBARA JOHNSON; DANIEL KAISER and BRENDA KAISER; DOUGLAS L. MARTIN and SUSAN MARTIN; DOUGLAS MEYERS; RICHARD MUNGER and KITTY MUNGER; LESLIE DAVID MYERS and FLORA MYERS; ROBERT PELLENZ and JOYCE PELLENZ; GLORIA RACE and GERALD RACE; CHRISTINE STEVENS, as Administratrix of the Estate of Charles Stevens, Deceased; PHILLIP STEVENS and LINDA STEVENS; JAMES SWITZER and KAY SWITZER; and LEE ROY PARODY,

Petitioners,

against

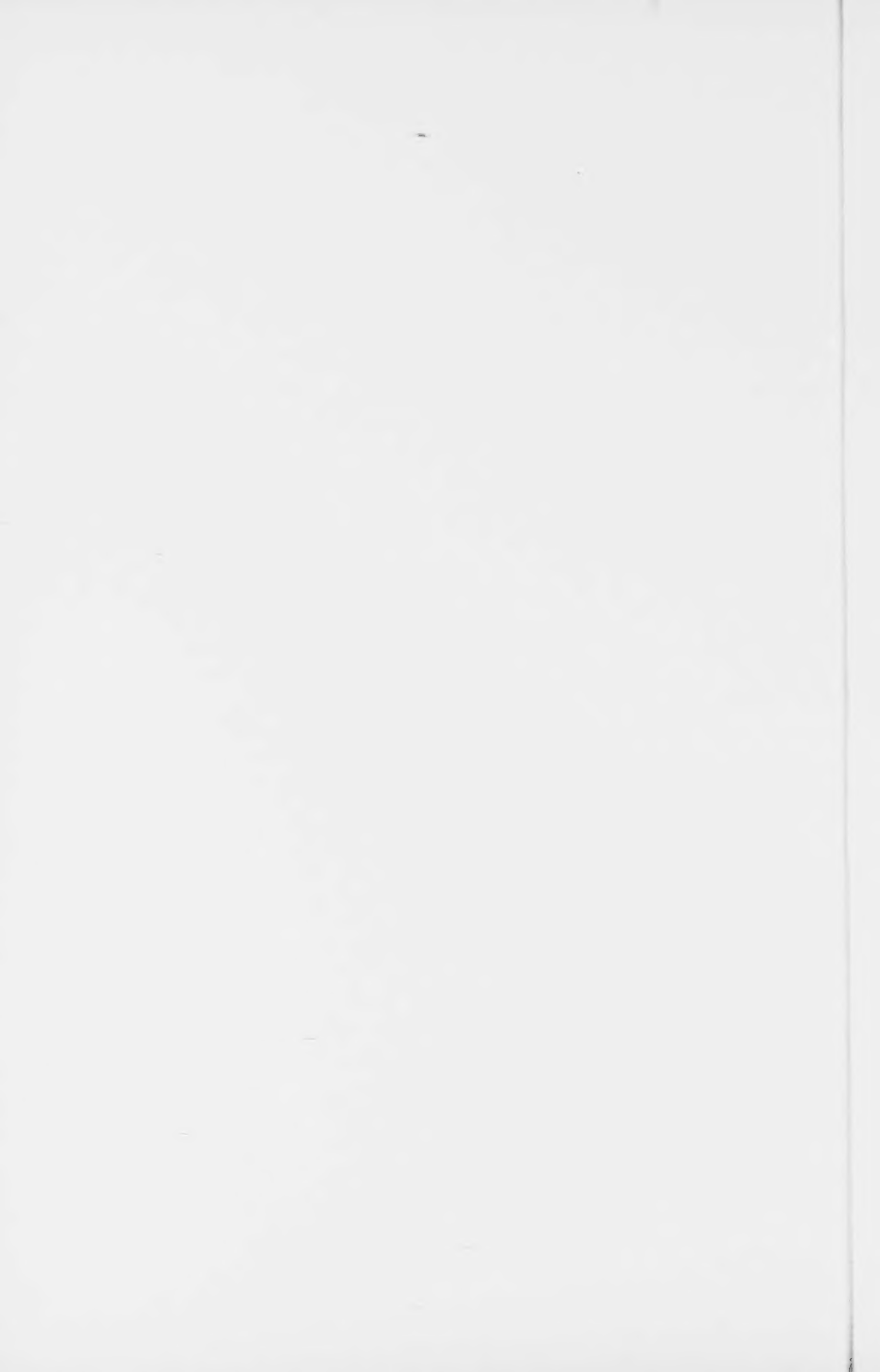
METALLURGIE HOBOKEN-OVERPELT, S.A.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS, SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether the Court's adherence to the traditional "doing business" test pursuant to C.P.L.R. 301 is unnecessarily restrictive when applied to a sophisticated corporate structure.

2. Whether the question of agency should encompass and be determined by the totality of the activities of a corporate structure and not be restricted to traditional indicia of "doing business."

3. Whether the Court's characterization of certain facts as "undisputed" was error and deprived Petitioners of a hearing on the merits of jurisdiction in violation of Petitioners' rights under the Fourteenth Amendment.

Parties

All of the parties to the proceeding in the United States Court of Appeals for the Second Circuit were the Petitioners and Respondent.

Constitution and Statutory Provisions Involved

Amendment XIV of the United States Constitution; New York Civil Practice Law and Rules §301 and §302(a)(3)(i) (McKinney 1972) (hereinafter referred to as "CPLR").

JURISDICTION

Jurisdiction to review the judgment in question by Certiorari is conferred by Title 28 U.S.C. §1254(1).

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990.

BRUCE BALL and BEVERLY BALL; ALVIN LLOYD BARTLETT, JR. and PATRICIA BARTLETT; HARRY ART BRUTCHER and COLLEEN BRUTCHER; STEVEN BRUTCHER and GLADYS BRUTCHER; FRED W. BUFFHAM and SANDRA BUFFHAM; DONALD G. BURDICK; GORDON F. CASEY and JOANNE CASEY; JEANETTE KOSTURIK, as Administratrix of the Estate of Mary Chmielewski, Deceased; JOHN F. COUGHLIN, SR. and LORRAINE COUGHLIN; KATHY FAZEKAS and KEITH FAZEKAS; RAYMOND GUILLES; KARL W. HERSHEY and SHARON HERSHEY; DAVID P. HILFIKER and LAURIE HILFIKER; THOMAS HODSON and JUDY MAE HODSON; FRANK G. JOHNSON and BARBARA JOHNSON; DANIEL KAISER and BRENDA KAISER; DOUGLAS L. MARTIN and SUSAN MARTIN; DOUGLAS MEYERS; RICHARD MUNGER and KITTY MUNGER; LESLIE DAVID MYERS and FLORA MYERS; ROBERT PELLENZ and JOYCE PELLENZ; GLORIA RACE and GERALD RACE; CHRISTINE STEVENS, as Administratrix of the Estate of Charles Stevens, Deceased; PHILLIP STEVENS and LINDA STEVENS; JAMES SWITZER and KAY SWITZER; and LEE ROY PARODY,

Petitioners,

against

METALLURGIE HOBOKEN-OVERPELT, S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Petition for a Writ of Certiorari

Opinions Below

This is a Petition for a Writ of Certiorari to review the order of the Second Circuit Court of Appeals, New York, New York, entered on April 27, 1990, (Appendix A) which affirmed the August 3, 1989, Judgment of the District Court for the Northern District of New York (Neal P. McCurn, Chief Judge) (Appendix B) dismissing for lack of personal jurisdiction a diversity suit seeking damages for employment related injuries sustained as a result of inhaling dust and fumes from cobalt products defectively processed by Defendant, MHO, a Belgian corporation.

Statement of the Case

A diversity suit was filed in the Northern District of New York in 1987 by Plaintiffs alleging that they had developed "cobalt related Hard Metals Disease" through exposure to cobalt-containing products defectively processed by MHO and used in a tungsten carbide plant operated by The Valeron Corporation, Dewitt, New York.

MHO is a metal processing plant incorporated in Belgium. Afrimet is MHO's New York sales agent for distribution of MHO's product in New York, the United States, and Canada.

Defendant asserted lack of personal jurisdiction in its Answer and shortly thereafter moved pursuant to Rule 56(b) for summary judgment. The District Court held a conference on the motion and granted Plaintiffs' leave to conduct discovery on the jurisdictional question before filing opposing papers. After discovery, Plaintiffs filed a cross motion for summary judgment.

The District Court granted MHO's motion for summary judgment and denied Plaintiffs' cross motion.

Reasons for Accepting the Writ

I

Improper application of the "doing business" test for establishing personal jurisdiction

The Court applied the traditional test of doing business in order to evaluate Petitioners' claim of jurisdiction under CPLR Section 301. Judge McCurn felt that there were sufficient facts to determine that Afrimet engages in solicitation in New York on behalf of MHO. Appendix B at 25. The "doing business test" can be met if the foreign corporation has an agent or employee who solicits business in New York systematically, and who devotes a major portion of his time to promoting the business interests of the Defendant. Solicitation plus additional business activities related to the Defendant's operative or financial structure usually satisfies the "doing business test." *Scanapico v. Richmond, Fredericksburg & Potomac R. Co.*, 439 F.2d 17 (affirmed *en banc* 439 F.2d 25)(2d Cir. 1970).

Judge McCurn properly determined that there needed to be sufficient additional facts before the Court could make a valid inference of an agency relationship between MHO and Afrimet. However, the Court looked to traditional indicia of agency. The Court found that there was no common ownership and no formal agency agreement between the two companies. The Court found that there was no proof that Afrimet was authorized to bind MHO, and MHO did not have an office, real estate, or personnel that regularly worked in New York.

The Courts below erred in applying the traditional narrow "doing business" test to determine agency relationship to a sophisticated, complex, international, corporate structure. The Defendant's activities go beyond mere solicitation. "When its New York representative provides services beyond 'mere solicitation' and these services are sufficiently important to the foreign corporation, that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." *Gelfand v. Tanner Motor Tours, LTD.*, 385 F2d 116, 121 *cert. denied* 390 U.S. 996 (2d Circ. 1967). This being the case, Afrimet was acting as an agent for MHO in a regular and systematic manner to satisfy the "doing business test" as stated in *Frummer v. Hilton Hotels International*, 19 N.Y.2d 533 (1967).

Realities rather than the formal agency requirements should be the test when a third-party seeks to base jurisdiction over the non-domiciliary on grounds of the acts of an agent. Afrimet (agent) acted for the benefit of and with the knowledge and consent of MHO (the principal), and the principal, MHO, retained some element of control over Afrimet (the agent)."

The Appellate Court held that Section 301 has been construed to authorize the exercise of jurisdiction over a corporation if the Defendant does business in New York in the "traditional sense." *Frummer* at 538. Occasional or casual business in New York does not suffice to bring the foreign corporation under Section 301.

The Defendant corporation is a sophisticated entity structured to avoid jurisdictional issues. The realities of the situation are that the Courts will not find traditional indicia of doing business. The New York Courts, by adhering to the restrictive traditional tests for agency, omit

foreign corporations from jurisdiction who are in fact doing business in New York in a regular and systematic manner.

II

Afrimet is the Agent of Metallurgie Hoboken-Overpelt, S.A.

The Courts erred in not considering all the acts that Afrimet did on behalf of and for the benefit of MHO.

A central element of the agency relationship is consent by the principal that another party act on its behalf and also by retention of control by the principal. *AHN v. Rooney Pace, Inc.*, 624 F.Supp. 368 (S.D.N.Y. 1985). The following examples illustrate this principal:

a) MHO and Afrimet Indussa share shipping responsibilities. Some items are shipped directly by MHO and some by Afrimet (MHO controls shipment, App. 388-389, 399-400);

b) MHO has a direct involvement in the price that Afrimet charges for products (MHO controls price, App. 388, 389, 399, 400, 403);

c) Long term supply agreements between Afrimet and a customer must be discussed and cleared with MHO in advance (MHO controls sales, App. 422-443);

d) MHO controls price and pays Afrimet on a commission basis; customers pay Afrimet a price determined by MHO and Afrimet deducts commission and remits the balance to MHO (MHO controls price and payment, App. 403-408);

e) Afrimet shares responsibilities and costs of debt recovery with MHO (MHO controls debt recovery, App. 52-53);

f) Afrimet is the exclusive sales agent in the United States and Canada for MHO's cobalt, powders, oxides, and salts; (MHO controls supply, App. 269, 270, 383, 387-391)

In addition to these facts, Afrimet is responsible for developing new markets for MHO's products in the United States; all questions relating to technical matters are referred to MHO for decision. MHO regularly attends meetings in the United States with Afrimet and its customers. Afrimet conducts all business from its offices in New York and stipulates in its sales contracts that all sales are governed by New York State Law. (Appendix C; App. 428-430).

The totality of the involvement between these two companies goes beyond mere solicitation. The relationship between the foreign Defendant, MHO, and Afrimet give rise to a "valid inference of an agency relationship." *Bulova Watch Co. Inc. v. K. Hattori & Co., Ltd.*, 508 F.Supp. 1322, 1334 (E.D.N.Y. 1981) and *Frummer* at 538, 281 N.Y.S.2d at 44. From the course of conduct between the parties, there is a valid inference as to the broad scope of agency.

Afrimet was doing business in New York on behalf of MHO. To apply *Frummer*, Afrimet does all the business which MHO could do were it here by its own officials. Further, Afrimet's representation of MHO goes beyond mere solicitation. *Gelfand* at 121. MHO is engaged in the systematic course of doing business in New York through its agent, Afrimet. As noted above, MHO does control

many significant aspects of Afrimet's New York operation because an agency relationship exists.

A narrow restrictive test of agency which employs the absence or presence of traditional indicia of agency is inapplicable in this case due to the nature of the Defendant. The Court should look to the totality of the circumstances in determining an agency relationship between this foreign corporation and its New York sales company.

III

Petitioners are entitled to a hearing on the merits of jurisdiction

"After discovery, the Plaintiffs' *prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the Defendant." *Hoffritz for Cutlery, Inc. v. Amajac*, 763 F.2d 55 (2d Cir. 1985). At that point, the *prima facie* showing must be factually supported. A Rule 56 motion asserts that there are undisputed facts demonstrating the absence of jurisdiction. In this case, the Plaintiffs contest the Defendant's factual allegations concerning the absence of jurisdiction. Therefore, an evidentiary hearing is required at which the Petitioners must prove the existence of jurisdiction by a preponderance of the evidence. *Cutco Industries v. Naughton*, 806 F.2d 361, 364-65 (2d Cir. 1986).

The District Court characterized certain facts as undisputed by the parties, such as the absence of a formal agency agreement, the absence of common ownership, and the absence of ownership of New York real property.

Because of this characterization, the District Court held that the Plaintiffs had failed to make a prima facie showing of jurisdiction over the Defendant as required by CPLR Section 301 and CPLR Section 302.

The Court ruled that the Defendant has made a showing pursuant to Rule 56(b) that there are undisputed facts demonstrating the lack of jurisdiction. Petitioners' position is that these facts are the Court's characterization of a traditional simplistic agency relationship. These issues—formal agency, common ownership, New York real estate—are only factors to be considered in assessing the relationship between MHO and Afrimet. The Court failed to recognize that there are many disputed issues of jurisdiction that need to be resolved at a hearing. Since there has been no hearing on the issue of jurisdiction, Plaintiffs have been denied their due process in this matter.

Plaintiffs are entitled to a hearing to determine whether there is an issue of agency. Their prima facie showing has been supported by factual allegations, and those allegations which are disputed can be more fully evaluated at a hearing on the merits.

Conclusion

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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**APPENDIX A—Opinion of the United States Court of
Appeals, Second Circuit, decided April 27, 1990.**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 624—August Term 1989

Argued: January 11, 1990 Decided: April 27, 1990

Docket No. 89-7826

BRUCE BALL, ET AL.,

Plaintiffs-Appellants,

—v.—

METALLURGIE HOBOKEN—OVERPELT, S.A.,

Defendant-Appellee.

B e f o r e :

KAUFMAN, MESKILL, and NEWMAN,

Circuit Judges.

Appeal from the August 3, 1989, judgment of the District Court for the Northern District of New York (Neal P. McCurn, Chief Judge) dismissing for lack of personal jurisdiction a diversity suit seeking damages for employment-related injuries sustained as a result of

inhaling dust and fumes from cobalt products defectively processed by defendant, a Belgian corporation.

Affirmed.

SUSAN CUMMINS DOAN, Wash., D.C.
(Ashcraft & Gerel, Wash., D.C., and
Anthony Endieveri, Camillus, N.Y., on
the brief), *for plaintiffs-appellants*.

JAMES L. CHIVERS, Binghamton, N.Y.
(James F. Lee, Paul T. Sheppard, Hin-
man, Howard & Kattell, Binghamton,
N.Y., on the brief), *for defendant-
appellee*.

JON O. NEWMAN, *Circuit Judge*:

This appeal of a diversity case raises several issues concerning the assertion of personal jurisdiction over foreign corporations pursuant to N.Y. Civ. Prac. L. & R. §§ 301 & 302 (McKinney 1972 & Supp. 1990). The issues arise on plaintiffs' appeal from the August 3, 1989, judgment of the District Court for the Northern District of New York (Neal P. McCurn, Chief Judge) dismissing for lack of personal jurisdiction their complaint against defendant Metallurgie Hoboken-Overpelt, S.A. ("MHO"), a metals processing company incorporated in Belgium. The suit sought damages for employment-related injuries allegedly sustained by the plaintiffs as a result of inhaling dust and fumes from cobalt products defectively processed by MHO. After

extensive discovery and the filing of cross-motions for summary judgment, the District Court found that plaintiffs had failed to make a *prima facie* showing that MHO does business in New York (section 301) or has acted so as to come within the reach of New York's long-arm statute (section 302). We affirm.

Background

The plaintiffs in this action include individuals who worked at a tungsten carbide plant operated by Valeron Corporation in DeWitt, New York, prior to the plant's closing in 1982.¹ In their complaint, filed in 1987, they alleged that they developed "cobalt-related Hard Metals Disease" through exposure to cobalt-containing products defectively processed by MHO and used at the plant. Defendant asserted lack of personal jurisdiction in its answer, and, shortly thereafter, moved pursuant to Rule 56(b) for summary judgment on this basis. The District Court held a conference on the motion and granted plaintiffs leave to conduct discovery on the jurisdictional question before filing opposing papers.

Plaintiffs conducted discovery for nearly a year. These efforts included document production, extensive interrogatories, requests for admission, and depositions of several officers of MHO and of Afrimet-Indussa, Inc. ("Afrimet"), a New York-based sales organization alleged by plaintiffs to be MHO's agent in New York. Viewing the facts in a light most favorable to the plaintiffs, *Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757,

1 Claims are also brought by the spouses of some of the workers and by the administratrices of two deceased workers. For convenience, we will use "plaintiffs" to mean those employed at the plant.

762 (2d Cir. 1983), the District Court found that discovery revealed the following. Prior to 1982, plaintiffs' employer, Valeron, purchased cobalt products from Afrimet, which sells metal products to customers throughout the United States and Canada and transacts all its business from a New York City office. Afrimet, in turn, buys a variety of metal products processed by MHO and other processing companies. Although there was some dispute as to whether, prior to 1985, any of the metals purchased by Afrimet had been owned by MHO or had merely been processed by MHO, it was undisputed that after 1985 Afrimet purchased metals, including cobalt-containing products, that MHO owned.

As of the time of suit, there was no evidence of common ownership, direct or indirect, between MHO and Afrimet. There was evidence that Afrimet engaged in some solicitation in New York on behalf of MHO and consulted with the latter over efforts to promote and market MHO products in New York. Afrimet typically consulted MHO before contracting with third parties to sell MHO products on a long-term basis. Afrimet held an exclusive sales right for certain of MHO's "cobalt special products," including powder oxides and salts. There was, however, no formal agency agreement between Afrimet and MHO, and the former did not sign contracts on the latter's behalf or make reference to MHO in its own contracts with third parties.

As noted by the District Court, none of the facts summarized above was disputed by the parties. In November 1988, plaintiffs cross-moved for summary judgment on the jurisdictional issue. The District Court held that plaintiffs had failed to make a *prima facie* showing of jurisdiction over the defendant. The District Court ruled

that plaintiffs had failed to present facts sufficient to support an inference that Afrimet acted as MHO's New York agent, and thus that MHO was doing business (for purposes of section 301) in New York through Afrimet. The Court also ruled that plaintiffs had failed to make a *prima facie* showing (for purposes of section 302(a)(3)(i)) that MHO "derives substantial revenue from goods used or consumed" in New York. Accordingly, the Court granted MHO's motion for summary judgment and denied plaintiffs' cross motion. This appeal followed.

Discussion

I. Procedure for Establishing Personal Jurisdiction

As a preliminary matter, the District Court considered the type of showing a plaintiff must meet to defeat a defendant's claim that a court lacks personal jurisdiction over it. In determining the nature of the plaintiff's obligation, Judge McCurn detected what he took to be conflicting signals from two recent decisions of this Court, *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55 (2d Cir. 1985), and *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117 (2d Cir. 1984). In *Hoffritz*, we said that though a plaintiff bears the burden of establishing jurisdiction over the defendant by a preponderance of the evidence, the plaintiff need make only a *prima facie* showing that jurisdiction exists prior to the holding of an evidentiary hearing. 763 F.2d at 57. In *Beech Aircraft*, we had previously rejected a plaintiff's contention that it need establish only a *prima facie* case of jurisdiction in order to defeat a Rule 12(b)(2) motion and had said that a plaintiff must establish personal jurisdiction by a preponderance of the evidence.

751 F.2d at 120. Judge McCurn extracted from these decisions two approaches: (1) only a *prima facie* showing is needed to defeat a jurisdiction testing motion *before discovery*; (2) jurisdiction must be established by a preponderance of the evidence at a hearing conducted *after discovery*. The District Judge felt it was unclear which approach applied where a jurisdiction testing motion (either under Rule 12(b)(2) or Rule 56) is presented after discovery but before an evidentiary hearing. He selected the "*prima facie*" approach because *Hoffritz* is the more recent decision and because other district courts in the Circuit appear to be requiring only a *prima facie* showing in these circumstances. See, e.g., *Lana Mora, Inc. v. S.S. Woermann Ulanga*, 672 F. Supp. 125, 126-27 (S.D.N.Y. 1987); *Forgash v. Paley*, 659 F. Supp. 728, 729-30 (S.D.N.Y. 1987).²

We agree with Judge McCurn that the nature of the plaintiff's obligation varies depending on the procedural posture of the litigation. Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, see Fed. R. Civ. P. 11, legally sufficient allegations of jurisdiction. At that preliminary stage, the plaintiff's *prima facie* showing may be established solely by allegations. After discovery, the plaintiff's *prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an

2 At least one other court in this Circuit appears to have had the same difficulty in construing *Hoffritz* and *Beech Aircraft* and to have resolved the problem in the same manner. See *Nordic Bank PLC v. Trend Group, Ltd.*, 619 F. Supp. 542, 563 n.19 (S.D.N.Y. 1985). Another has regarded *Beech Aircraft* as controlling and as establishing that once substantial discovery has been conducted, the trial court may, in its discretion, require the plaintiff to demonstrate jurisdiction by a preponderance of the evidence. See *Grill v. Walt Disney Co.*, 683 F. Supp. 66, 67-68 (S.D.N.Y. 1988).

averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant. *Hof-fritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d at 57; *Birmingham Fire Insurance Co. v. KOA Fire & Marine Insurance Co.*, 572 F. Supp. 962, 964 (S.D.N.Y. 1983). At that point, the *prima facie* showing must be factually supported.

Where the jurisdictional issue is in dispute, the plaintiff's averment of jurisdictional facts will normally be met in one of three ways: (1) by a Rule 12(b)(2) motion, which assumes the truth of the plaintiff's factual allegations for purposes of the motion and challenges their sufficiency, (2) by a Rule 56 motion, which asserts that there are undisputed facts demonstrating the absence of jurisdiction, or (3) by a request for an adjudication of disputed jurisdictional facts, either at a hearing on the issue of jurisdiction or in the course of trial on the merits. If the defendant is content to challenge only the sufficiency of the plaintiff's factual allegation, in effect demurring by filing a Rule 12(b)(2) motion, the plaintiff need persuade the court only that its factual allegations constitute a *prima facie* showing of jurisdiction. If the defendant asserts in a Rule 56 motion that undisputed facts show the absence of jurisdiction, the court proceeds, as with any summary judgment motion, to determine if undisputed facts exist that warrant the relief sought. If the defendant contests the plaintiff's factual allegations, then a hearing is required, at which the plaintiff must prove the existence of jurisdiction by a preponderance of the evidence. See *Cutco Industries Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986); *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d at 120; *United States v. Montreal Trust*

Co., 358 F.2d 239, 242 n.4 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966).³

In the pending case, the issue of jurisdiction was submitted by both sides on cross motions for summary judgment. Since discovery had occurred, Judge McCurn properly examined the record to determine if there were undisputed facts that could resolve the jurisdictional issue. He did not require the plaintiff to prove its facts by a preponderance of the evidence, since that is a standard of proof appropriate for resolving disputed issues of fact. Judge McCurn was able to determine that the undisputed facts demonstrated the absence of jurisdiction over the defendant. Whether that conclusion was substantively correct is the issue to which we now turn.

II. Personal Jurisdiction Under New York Law

"[T]he amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits," *Arrowsmith v. United Press International*, 320 F.2d 219, 223 (2d Cir. 1963) (in banc). Plaintiffs rely on two provisions of New York law, sections 301 and 302(a)(3)(i). Because the District Court correctly held that neither statute sustains the assertion of jurisdiction over MHO in this case, it is not necessary to consider

3 We believe this formulation is consistent with both *Hoffritz* and *Beech Aircraft*. *Hoffritz* emphasized that only a *prima facie* showing is required prior to an evidentiary hearing. *Beech Aircraft* emphasized that where such a showing is contested, a plaintiff, after discovery, must prove jurisdiction by a preponderance of the evidence at a pre-trial hearing or at trial. In stating that, after discovery, a Rule 12(b)(2) motion could not be defeated simply by presentation of a *prima facie* case, *Beech Aircraft* was focusing on the situation where a *prima facie* factual showing is "contested," 751 F.2d at 120, a situation that requires a hearing.

MHO's further contention that assertion of personal jurisdiction over it would violate the Due Process Clause of the Fourteenth Amendment.

A. *Section 301—Doing Business.* Section 301 has been authoritatively construed to authorize the exercise of jurisdiction over a foreign corporation if the defendant "does business" in New York in the "traditional sense." *Frummer v. Hilton Hotels International, Inc.*, 19 N.Y.2d 533, 536, 281 N.Y.S.2d 41, 43 (emphasis in original), *cert. denied*, 389 U.S. 923 (1967).⁴ The latter phrase has been consistently interpreted to mean that section 301 applies only when the defendant is "engaged in such a continuous and systematic course of 'doing business' [in New York] as to warrant a finding of its 'presence' " in the jurisdiction. *Id.* (quoting *Simonson v. International Bank*, 14 N.Y.2d 281, 285, 251 N.Y.S.2d 433, 436 (1964)). Occasional or casual business in New York does not suffice under section 301. Since a corporation amenable to jurisdiction under section 301 may be sued in New York on causes of action wholly unrelated to acts done in New York, *see Cohen v. Vaughan Bassett Furniture Co., Inc.*, 495 F. Supp. 849, 850 (S.D.N.Y. 1980), its exposure to suit on such a wide range of legal actions requires a showing that it is doing business in New York "with a fair measure of permanence and continuity," *Laufer v. Ostrow*, 55 N.Y.2d 305, 310, 449 N.Y.S.2d 456, 458 (1982).

Plaintiffs concede that MHO exhibits none of the traditional signs of an entity doing business in the state in its own right. MHO owns no real estate in New York,

4 The statute itself provides: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." N.Y.Civ. Prac. L. & R. § 301 (McKinney 1972).

maintains no office, and has no personnel who regularly work in the state. Nevertheless, plaintiffs contend that MHO does business in New York through an agent, Afrimet, which promotes sales, provides service, and essentially does everything MHO could do if it sold products in New York in its own right. In this regard, plaintiffs rely on certain uncontested facts. Afrimet obtains some of its products exclusively from MHO and has an exclusive sales right in the United States for certain MHO cobalt products. Afrimet is able to limit its inventory of MHO products in the United States because MHO permits it to rely on direct shipment of MHO products from Belgium to Afrimet's customers. For such shipments, Afrimet assumes title and risk of loss in Belgium. Afrimet typically retains a commission—three or four percent—of the final market price paid by an Afrimet customer, rather than purchasing from MHO at wholesale and selling at retail. A number of contracts between the two companies contain provisions requiring Afrimet to use its best efforts to promote MHO products, and there is evidence that Afrimet has succeeded in opening up new markets for some MHO metals. Finally, the record shows that Afrimet obtains oral assurances of supply from MHO before entering into long-term contracts with customers, that it frequently refers technical customer inquiries to MHO personnel, and that occasionally Afrimet and MHO employees attend meetings at each other's facilities and exchange technical and marketing information.

The District Court correctly concluded that these facts were insufficient as a matter of law to support an inference of agency, *Frummer v. Hilton Hotels International, Inc.*, *supra*, by which MHO can be deemed to be doing business in New York because of Afrimet's presence and

activities in the state. Prior cases have not specified an exclusive set of considerations that will give rise to such an inference, but among those previously deemed sufficient have been: the existence of an express agency agreement, *Berner v. United Airlines*, 3 N.Y.2d 1003, 170 N.Y.S.2d 340 (1957), actions taken by the New York-based entity with respect to third parties that were binding on the foreign defendant, *Welinsky v. Resort of the World D.N.V.*, 839 F.2d 928 (2d Cir. 1988); *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968), and solicitation by a non-profit New York entity for the benefit of a commonly-owned foreign corporation, *Frummer v. Hilton Hotels International, Inc.*, *supra*. Jurisdiction has been denied where the corporate entities were truly separate, where the foreign defendant relinquished title and risk of loss outside the state, and where promotion of the defendant's product by the in-state corporation constituted "mere solicitation." *Delagi v. Volkswagenwerk AG*, 29 N.Y.2d 426, 328 N.Y.S.2d 653 (1972); *Fordyce v. Round Hill Developments, Ltd.*, 585 F.2d 30 (2d Cir. 1978). We agree with the District Court that the latter cases are more accurate analogies for the relationship between MHO and Afrimet.

Although plaintiffs have alleged that Afrimet's sales contracts with customers, such as Valeron, are binding on MHO, they have produced no evidence—by way of document or otherwise—to support this allegation. Such bare legal allegations may be sufficient to withstand a 12(b)(2) motion, but, without factual support, fail to make a *prima facie* showing at the summary judgment stage, once discovery has occurred. Furthermore, the fact that Afrimet is paid on a commission basis does not, by itself, render it MHO's agent, *see Cohen v.*

Vaughan Bassett Furniture Co., Inc., supra, especially since Afrimet bears the risk of loss associated with transporting goods to customers and enters into contracts with those customers only in its own behalf. The existence of an exclusive sales contract with respect to a limited number of products, sharing of technical and marketing information, and limited solicitation on behalf of both companies do not demonstrate that the relationship between Afrimet and MHO is more than that of major distributor to manufacturer, *see McShan v. Omega Louis Brandt et Frere, S.A.*, 536 F.2d 516, 517-18 (2d Cir. 1976); *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1529 n.5 (S.D.N.Y. 1985). The relationship is not sufficient to support plaintiffs' claim that MHO is doing business in New York through Afrimet.

B. *Section 302(a)(3)(i)—Long-arm Jurisdiction.* The District Court also rejected plaintiffs' contention that jurisdiction may be asserted under section 302(a)(3)(i).⁵ The Court ruled that 1987—the year the complaint was filed—was the proper point in time for examining whether MHO “derives substantial revenue from goods used or consumed” in New York, that substantial revenue in either an absolute or relative sense will support

5 The statute provides:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, . . . who in person or through an agent:

• • •

3. commits a tortious act without the state causing injury to person or property within the state . . . , if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state

N.Y. Civ. Prac. L. & R. § 302(a)(3)(i) (McKinney 1972).

long-arm jurisdiction, *see Allen v. Canadian General Electric Co. Ltd.*, 65 A.D.2d 39, 410 N.Y.S.2d 707 (3d Dep't 1978), *aff'd on opinion below*, 50 N.Y.2d 935, 431 N.Y.S.2d 526 (1980), and that plaintiffs failed to make a *prima facie* showing that metal products sold by MHO to Afrimet in 1987 were "used or consumed" in New York. On appeal, plaintiffs contend that it was sufficient to show that sales between MHO and Afrimet totalled 20 to 24 million dollars, or one percent of MHO's total sales revenue; they also contend that New York law does not require them to trace the goods sold by a large corporation in order to identify the place where the goods are ultimately used or consumed. Defendant maintains that long-arm jurisdiction was lacking even if 1987 sales are relevant or, in the alternative, that predicated jurisdiction on sales in 1987 even though the injuries occurred prior to 1982—a time when MHO merely processed but did not sell metal products—would render the assertion of jurisdiction unforeseeable and therefore a violation of due process.

We find it unnecessary to consider defendant's due process argument because we agree that even if the statute is construed in a manner most favorable to the plaintiffs, there has been no *prima facie* showing of jurisdiction in this case. The few cases on point indicate that in order to sustain jurisdiction under section 302(a)(3)(i), plaintiffs must demonstrate more than substantial revenue from sales to a New York entity, they must make some showing that the associated goods are "used or consumed" in New York. For example, in *Young v. Mallet*, 49 A.D.2d 528, 529, 371 N.Y.S.2d 1, 3 (1st Dep't 1975) (*per curiam*), the Court dismissed a suit against an out-of-state author, observing that "[b]ooks are not used or consumed nor are they services

rendered.” See also *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967) (construing identical phrase in Connecticut’s long-arm statute). In *Birmingham Fire Insurance Co. v. KOA Fire & Marine Insurance Co.*, 572 F. Supp. at 966, the Court ruled that in order to survive summary judgment the plaintiff could not allege merely that defendant obtained substantial revenue from reinsuring New York risks; it needed to produce some “hard evidence” regarding which New York risks were involved and how much revenue had been obtained.

In this case, plaintiffs elicited deposition testimony from an officer of MHO’s sales department that sales to Afrimet were between 20 and 24 million dollars, or one percent of MHO’s total 1987 revenue. They presented no evidence, however, as to what portion of this figure was associated with products eventually sold to plants located in New York, despite undisputed evidence that Afrimet had a client base throughout the United States and Canada. Moreover, this is not a case in which plaintiffs’ efforts to marshal evidence on this point were frustrated by MHO’s or Afrimet’s inability or unwillingness to supply sales information. Even though discovery revealed that Afrimet often shipped products directly from Belgium to customers, plaintiffs failed to inquire what portion of these sales resulted in products delivered in New York. Plaintiffs’ reliance on *Allen v. Canadian General Electric Co. Ltd.*, 65 A.D.2d 39, 410 N.Y.S.2d 707 (3d Dep’t 1978), *aff’d*, 50 N.Y.2d 935, 431 N.Y.S.2d 526 (1980), is unavailing. Although the Court in *Allen* sustained jurisdiction without expressly finding that defendant’s products had been used or consumed in the state, there is no indication from the opinion that the issue was disputed. Moreover, it may be that for certain consumer products, such as the tea kettles in *Allen*,

use or consumption in New York may be inferred from sales to New York retailers. That can hardly be the case, however, for industrial products, a large percentage of which may never have even entered the state.

The judgment of the District Court is affirmed.

**APPENDIX B—Memorandum-Decision and Order of
the United States District Court, Northern District of
New York, dated July 28, 1989.**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

BRUCE BALL and BEVERLY BALL; ALVIN LLOYD BARTLETT, JR. and PATRICIA BARTLETT; HARRY ART BRUTCHER and COLLEEN BRUTCHER; STEVEN BRUTCHER and GLADYS BRUTCHER; FRED W. BUFFHAM and SANDRA BUFFHAM; DONALD G. BURDICK; GORDON F. CASEY and JOANNE CASEY; JEANETTE KOSTURIK, as Administratrix of the Estate of Mary Chmielewski, Deceased; JOHN F. COUGHLIN, SR. and LORRAINE COUGHLIN; KATHY FAZEKAS and KEITH FAZEKAS; RAYMOND GUILLES; KARL W. HERSHEY and SHARON HERSHEY; DAVID P. HILFIKER and LAURIE HILFIKER; THOMAS HODSON and JUDY MAE HODSON; FRANK G. JOHNSON and BARBARA JOHNSON; DANIEL KAISER and BRENDA KAISER; DOUGLAS L. MARTIN and SUSAN MARTIN; DOUGLAS MEYERS; RICHARD MUNGER and KITTY MUNGER; LESLIE DAVID MYERS and FLORA MYERS; ROBERT PELLENZ and JOYCE PELLENZ; GLORIA RACE and GERALD RACE; CHRISTINE STEVENS, as Administratrix of the Estate of Charles Stevens, Deceased; PHILLIP STEVENS and LINDA STEVENS; JAMES SWITZER and KAY SWITZER; and LEE ROY PARODY,

Plaintiffs,

against

METALLURGIE HOBOKEN-OVERPELT, S.A.,

Defendant.

87-CV-191

APPEARANCES:

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Memorandum-Decision and Order

NEAL P. MCCURN, C.J.

Until 1982, Valeron Corporation operated a tungsten carbide plant in DeWitt, New York; the plant was closed in 1982. During the course of their employment at Valeron, plaintiffs and/or their decedents allegedly inhaled and ingested cobalt or cobalt-containing fumes and dust, which they claim caused them or their decedents to develop "Hard Metals Disease" as well as other personal injuries. Basically plaintiffs claim that defendant, Metallurgie-Hoboken-Overpelt S.A. ("MHO"), is liable for those injuries because it "caused cobalt and cobalt-containing materials to be placed into the stream of interstate commerce, and to be sold within the State of New York." Complaint at p. 3, par. 2.

In November of 1987, MHO, a Belgian corporation, moved for summary judgment seeking dismissal of the

complaint on the basis that this court lacks personal jurisdiction over it. Plaintiffs contacted the court and requested a conference with respect to that motion. A conference was held on January 14, 1988, and plaintiffs were granted leave to conduct discovery on the jurisdiction issue before being required to respond to MHO's motion. Plaintiffs then deposed Thierry de Decker, a departmental engineer with MHO; Gaston Lancel, MHO's legal counsel; and Edward Kielty, a non-party witness employed by Afrimet-Indussa, Inc. ("Afrimet"). Plaintiffs also served interrogatories upon MHO and conducted document discovery.

After engaging in that fairly extensive discovery, plaintiffs responded to MHO's motion by making a cross-motion for partial summary judgment on the personal jurisdiction issue. On January 17, 1989, the court heard lengthy oral argument on these notions. Following oral argument the court ordered that the parties provide the court with additional information to clarify their respective positions. The court further ordered the parties to brief the issue of the appropriate time frame for analysis under New York Civ. Prac. L. & R. § 302(a)(3)(i)—one of the jurisdictional statutes relied upon by plaintiffs. The court has now had the opportunity to carefully consider the memorandums of law, affidavits, deposition transcripts and various documentation submitted by the parties; and following constitutes the court's decision in this regard.

Discussion

I. Standard of Proof

Before considering the merits of the parties' jurisdiction arguments, the court must determine which standard of proof to apply. In this Circuit there are basically two

different standards of proof, depending upon the procedural posture of the case. Unfortunately, it is not entirely clear which standard should be applied when substantial discovery has been conducted on the jurisdiction issue, as is the case here, and where a full blown evidentiary hearing has *not* been conducted or requested.¹

In *Hoffritz For Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55 (2d Cir. 1985), the Second Circuit stated:

The burden of establishing jurisdiction over a defendant, by a preponderance of the evidence, is upon the plaintiff. Until an evidentiary hearing is held, however, the plaintiff need make only a *prima facie*, showing that jurisdiction exists, and this remains true notwithstanding a controverting presentation by the moving party. In the absence of an evidentiary hearing on the jurisdictional allegations, or a trial on the merits, all pleadings and affidavits are construed in the light most favorable to the plaintiff, and where doubts exist, they are resolved in the plaintiff's favor.

Id. at 57 (citations omitted). As the court noted in *Nordic Bank PLC Trend Group, Ltd.*, 619 F.Supp. 542 (S.D.N.Y. 1985), however, that standard "appears at odds with Judge Winter's statement in *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117

¹Indeed at oral argument, MHO stated that an evidentiary hearing would be superfluous; and while arguing for the lesser burden of proof, plaintiffs stated that there are ample facts before the court for it to determine the personal jurisdiction issue as a matter of law at this juncture. Plaintiffs further stated that any factual issue which may exist is not determinative, although they seem to have somewhat retrenched on that position in their supplemental papers by stating that in the event the court finds a factual issue, both motions should be denied and the jurisdiction issue should be resolved at trial.

(2d Cir. 1984)." *Id.* at 563, n.19 ("*Beech Aircraft*"). In *Beech Aircraft*, Judge Winter stated:

[A] plaintiff must demonstrate by a preponderance of the evidence that *in personam* jurisdiction exists. . . . It is true that, when the issue is decided initially on the pleadings and without discovery, the plaintiff need show only a *prima facie* case. However, *if that initial decision is contested, the plaintiff must then prove, following discovery, either at a pre-trial hearing or a trial, that jurisdiction exists by a preponderance of the evidence.* Given that the district court permitted substantial discovery, VW must now be held to the preponderance burden.

Beech Aircraft, 751 F.2d at 120 (citations omitted) (emphasis added).

In *Nordic Bank*, after considering those seemingly conflicting decisions, Judge Goettel decided to follow *Hoffritz* because it was a more recent decision than *Beech Aircraft*, and because in his opinion it was "consistent with a long line of Second Circuit and Southern District pronouncements regarding the manner of resolving the issue of personal jurisdiction." *Nordic Bank*, 619 F.Supp. at 563, n.19. Since *Nordic Bank*, district courts have generally continued to follow the Second Circuit's approach as articulated in *Hoffritz*.²

²See, e.g., *Future Ways, Inc. v. Odiorne*, 697 F.Supp. 1339, 1340 (S.D.N.Y. 1988) (*prima facie* showing required where no "full-blown evidentiary hearing" conducted); *Norma Walters & Co., Inc. v. Clothes Garden, Inc.*, 693 F.Supp. 1549, 1550 n. 1 (S.D.N.Y. 1988) (same); *Forgash v. Paley*, 659 F.Supp. 728, 729-30 (S.D.N.Y. 1987) (*prima facie* standard applied where no full blown evidentiary hearing conducted, even though the parties had engaged in discovery limited to the jurisdiction issue.); *Lana Mora, Inc. v. S. S. Woermann Ul-* (Footnote continued on following page)

In *Cutco Industries v. Naughton*, 806 F.2d 361, 364-65 (2d Cir. 1986), the Second Circuit seemingly reaffirmed its position that the preponderance of the evidence standard is only to be applied in those situations where an evidentiary hearing is conducted. See also *First City National Bank v. Simmons*, Nos. 89-7111, - 7055 slip op. at 4101 (2d Cir. June 26, 1989) (implying that in the absence of an evidentiary hearing, plaintiff should be held to the lesser *prima facie* showing) (citing *Welinsky v. Resort of the World D.N.V.*, 839 F.2d 928, 930 (2d Cir. 1988)). It should be noted, however, that in *Cutco* the Court did not have before it the express issue of which standard to apply where the parties had conducted substantial discovery on the jurisdiction issue, but had not requested an evidentiary hearing.

In any event, despite several apparent opportunities to do so, the Second Circuit has *not* reaffirmed the view expressed by Judge Winter in *Beech Aircraft*—that is that a plaintiff may be held to a higher standard of proof when substantial jurisdictional discovery has been conducted, even in the absence of an evidentiary hearing. Thus, al-

(Footnote continued.)

anga, 672 F.Supp. 125, 127 (S.D.N.Y. 1987) (same); *Morse Typewriter v. Samanda Office Communications*, 629 F.Supp. 1150, 1151 (S.D.N.Y. 1986) (same). But see, *Tripmasters, Inc. v. Hyatt Intern. Corp.*, 696 F.Supp. 925, 930 (S.D.N.Y. 1988) (plaintiff "should be held . . . to its ultimate burden of a preponderance of the evidence" because plaintiff was allowed full discovery and an evidentiary hearing was not held because the parties offered to submit the notion on stipulated facts in lieu of a hearing); *Grill v. Walt Disney Co.*, 683 F.Supp. 66, 67-68 (S.D.N.Y. 1988) (where parties have conducted substantial discovery on the jurisdiction issue, plaintiff "may" be held to higher preponderance of the evidence standard of proof; but court did not decide the standard of proof issue therein because plaintiff failed to meet even the lesser *prima facie* standard); *City of New York v. Exxon Corp.*, 633 F.Supp. 609, 621 (S.D.N.Y. 1986) (suggesting that perhaps court would have applied preponderance of the evidence standard if defendant had argued for it because substantial discovery had been conducted on Erie jurisdiction issue).

though in the court's view the procedural posture of this action is such that it would not be unjust to hold plaintiffs to the more stringent standard, even in the absence of an evidentiary hearing or a trial on the merits, the court cannot ignore the clear weight of authority to the contrary. Consequently, because a "full-blown" evidentiary hearing has not been conducted here, it is only necessary for the plaintiffs to make a *prima facie* showing of personal jurisdiction to survive MHO's motion for summary judgment on that issue.

It is interesting to note that two of the cases relied upon by MHO actually support applying the lesser standard here. In *Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757 (2d Cir. 1983), for example, plaintiff was held to the higher preponderance of the evidence standard, but an evidentiary hearing was conducted there. Similarly, in *Birmingham Fire Ins. Co. v. KOA Fire & Marine Ins.*, 572 F.Supp. 962 (S.D.N.Y. 1983), the court stated:

[I]f a plaintiff's proof [of jurisdictional facts] is limited to written material, it is necessary only for these material *to demonstrate facts* which support a finding of jurisdiction in order to avoid a motion to dismiss.

Id. at 964 (quoting *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). Thus, neither *Beacon Enterprises* nor *Birmingham Fire* mandate a different result here.

II. Personal Jurisdiction

In a diversity action, such as the present one, it is well settled that personal jurisdiction over the defendant is determined by the law of the state in which the federal court sits. *United States v. First National City Bank*, 379 U.S.

378, 381-82, 85 S.Ct. 528, 530-31, 13 L.Ed.2d 365, — (1965); *Arrowsmith v. United Press International*, 320 F.2d 219, 223 (2d Cir. 1963) (en banc). MHO, in response to prior papers submitted by plaintiffs, addressed four such New York jurisdictional statutes in its original Memorandum of Law. After the completion of discovery, however, plaintiffs have limited their reliance to two New York jurisdictional statutes: N.Y. Civ. Prac. L. & R. §§301 and 302(a)(3)(i). Thus, the court need only consider the parties' positions with respect to those two statutes.

A. §301: "Doing Business"

In *Pellegrino v. Stratton*, 679 F.Supp. 1164 (N.D.N.Y. 1988), this court had occasion to reiterate the general principles which pertain to a determination of whether a non-domiciliary is "doing business" for purposes of § 301:

In New York, a non-domiciliary is subjected to personal jurisdiction under section 301 with respect to *any* cause of action, if the non-domiciliary is 'engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of 'presence' in this jurisdiction.' The test of whether a non-domiciliary is present within the jurisdiction is a 'simple pragmatic' one. Occasional or casual business in New York will not suffice to subject the non-domiciliary to personal jurisdiction in a New York court. . . . Rather, the non-domiciliary must be doing business in New York 'with a fair measure of permanence and continuity.' The quality and nature of the non-domiciliary's contacts with the state must be sufficient to make it reasonable and just according to "traditional notions of fair play and substantial

justice" that it be required to defend the action within that state. . . .

Id. at 1169-70 (citations omitted). Plaintiffs concede that MHO does not exhibit the classic indicia of doing business in New York. Specifically, plaintiffs concede that "MHO does not have an office in New York, real estate in New York, or personnel that work in New York on a regular basis." Plaintiffs' Corrected Memorandum of Law at p. 9-10. Plaintiffs strenuously assert, however, that Afrimet is MHO's New York "agent," or at the very least an "affiliate" of MHO, and that MHO was doing business within New York State through Afrimet as of February 27, 1987—the date this action was commenced.³ MHO contends that it was not doing business in New York at that time, through Afrimet or otherwise, and thus it cannot be subject to the jurisdiction of this court pursuant to § 301.

As MHO correctly stated, there are two possible theories upon which plaintiffs could rely to establish § 301 jurisdiction over MHO: the "mere department" theory or the "agency" theory. Although plaintiffs' motion papers could be read as relying upon both of those theories, at oral argument plaintiffs stressed that they were *not* relying upon the "mere department" theory, but only upon the agency theory. Based upon that representation, the court, insofar as is practicable, will limit its § 301 analysis to the agency theory.⁴

³To successfully invoke § 301, the defendant must have been doing business in New York when the action was commenced. See, *Aaa-con Auto Transport, Inc. v. Barnes*, 603 F.Supp. 1347, 1351 n.15 (S.D.N.Y. 1985) (and cases cited therein).

⁴The court recognizes that it is not always possible, however, to clearly differentiate between these two theories. See *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*, 508 F.Supp. 1322, 1334 (E.D.N.Y. 1981) (and cases cited therein).

Under the agency theory exclusively relied upon by plaintiffs, MHO would be subject to suit in New York pursuant to § 301 if the relationship between the foreign defendant, MHO, and Afrimet gives rise to a “ ‘valid inference’ of an agency relationship.” *Bulova Watch Co.*, 508 F.Supp. at 1334 (citations omitted); *see also Frummer v. Hilton Hotels International*, 19 N.Y.2d 533, 538, 281 N.Y.S.2d 41, 45, *cert. denied*, 389 U.S. 923, 88 S.Ct. 241, ____ L.Ed.2d ____ (1967) (common ownership significant because gave “rise to a valid inference as to the broad scope of the agency. . . .”). Stated somewhat differently, under the agency theory this court could properly exercise personal jurisdiction over MHO if Afrimet was doing business here on behalf of MHO. *See Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F.Supp. 1523, 1529 n. 5 (S.D.N.Y. 1985).

In the seminal case of *Frummer*, heavily relied upon by plaintiffs, the Court of Appeals held that the lower court, pursuant to § 301, properly exercised personal jurisdiction over the British corporate defendant as it was doing business in New York through its New York affiliate. In *Frummer*, the New York affiliate made reservations and provided advertising for the foreign corporate defendant. The Court of Appeals was persuaded by the “significant and pivotal” fact that the New York affiliate “does all the business which Hilton (U.K.) [the foreign corporate defendant] could do were it here by its own officials.” *Id.* at 537, 281 N.Y.S.2d at 44.

In *Gelfand Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967), *cert. denied*, 390 U.S. 996, 88 S.Ct. 1198, ____ L.Ed.2d ____ (1968), another case relied upon by plaintiffs, the Second Circuit embellished upon *Frummer* somewhat. In *Gelfand*, Judge Lumbard interpreted *Frummer* to mean:

[a] foreign corporation is doing business in New York 'in the traditional sense' when its New York representative provides services beyond 'mere solicitation'; and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.

Id. at 121. Under those circumstances, the foreign defendant may be found to be doing business in New York "but only if, in addition, it can be shown that the relation between the corporation and the New York representative is such that an 'inference of agency' can be made." Weinstein, Korn & Miller, CPLR Manual § 3.04[d] (1986). Thus, in *Gelfand*, the Second Circuit inferred the existence of an agency relationship between a foreign corporation and its New York representative because the latter had the power to make binding reservations on bus tours operated by the foreign corporate defendant. The Court also found significant the fact that the New York representative generated three/sevenths of the foreign defendant's business (\$120,000.00 annually), thus concluding that the foreign defendant engaged in a "systematic course of doing business in New York." *Id.*

The Second Circuit recently reaffirmed the *Frummer* test, finding that plaintiffs made a *prima facie* showing of personal jurisdiction under § 301 where the evidence established that the foreign defendant, a hotel, partially owned a local booking agency, and that that agency had the authority to make and confirm reservations without checking with the foreign defendant. See *Welinsky v. Resort of the World D.N.V.*, 839 F.2d 928 (2d Cir. 1988).

Delagi v. Volkswagenwerk AG, 29 N.Y.2d 426, 328 N.Y.S.2d 653 (1972), a case MHO claims is factually identical to the present one, stands in marked contrast to *Gelfand* and *Frummer*. In *Delagi*, the German corporate defendant exported its cars into the United States through a New Jersey corporation, a wholly owned subsidiary of defendant. The New Jersey corporation in turn resold the cars to franchisee wholesale distributors, including a franchisee dealer, located within New York State. The Court refused to find that the undisputed facts therein gave rise to "a valid inference of agency," even though the plaintiff alleged that the foreign corporation exercised significant control over the New York franchisee. *Id.* at ____, 328 N.Y.S.2d at 656. The Court of Appeals explained that it "has never held a foreign corporation present on the basis of control, unless there was in existence at least a parent-subsidiary relationship." *Id.* at ____, 328 N.Y.S.2d at 657.

After *Delagi*, at least one commentator has observed:

In short, if a foreign corporation is to be found doing business here because of the acts of a local corporation, a true agency must be found between the two corporations—an agency marked by the usual trappings of control and fiduciary obligations.

N.Y. Civ. Prac. L. & R. C301:3 (1972) (McKinney Supp. 1989). That observation is consistent with subsequent case law. For example, in *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F.Supp. 1523 (S.D.N.Y. 1985), the court declined to find an agency relationship by inference where the relationship was simply one of major distributor to manufacturer. *Id.* at 1529 n. 5. Likewise, in *McShan v. Omega Louis Brandt Et Frere, S.A.*, 536 F.2d 516 (2d Cir. 1976), relying upon *Delagi*, the Second Circuit held

that the foreign defendant was not doing business in New York based upon the fact that a New York corporation, a "wholly independent legal entity," which was neither owned nor controlled by the defendant, bought defendant's product f.o.b. in Switzerland. *Id.* at 517. The Court was not persuaded by the fact that the products were advertised in the New York media. *Id.*

In *Beech Aircraft*, the Second Circuit examined the relevant New York case law and gleaned four factors from those cases which courts should consider in determining whether to exercise personal jurisdiction under § 301 over a foreign corporate defendant based upon the activities of a New York based agent or affiliate. Those facts are: (1) common ownership, (2) financial dependency of the subsidiary on the parent corporation, (3) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities, and (4) the degree of control over the marketing and operational policies of the subsidiary exercised by the parent. *Beech Aircraft*, 751 F.2d at 120-22. Relying in part upon *Delagi*, the Second Circuit held that common ownership is the "essential" factor. *Id.* at 120. The Second Circuit found in *Beech Aircraft* that the foreign corporate defendant was doing business in New York through its wholly owned subsidiary, which the Court determined was a "mere department" of the foreign defendant.

Even though *Beech Aircraft* is a "mere department" case, as previously mentioned, such bright line distinctions cannot be drawn between that theory of personal jurisdiction and the agency theory. As the Chief Judge Weinstein so cogently stated:

The apparently distinct notions are metonyms for a jurisdictional balancing assessing the fairness of requiring an out-of-state party to defend itself in

New York when it derives benefits from in-state activities.

Bulova Watch, 508 F.Supp. at 1334. Thus, even though *Beech Aircraft* purports to be a "mere department" case, and the present case is an "agency" case, the court will nonetheless consider the *Beech Aircraft* factors, among others, because that legal framework at least provides some order and cohesiveness to this somewhat muddled area of the law.

In the present case, relying upon *Gelfand* and *Frummer*, plaintiffs assert that MHO should be subject to the jurisdiction of this court under § 301 because "[i]f Afrimet did not sell metal products in the United States on behalf of MHO, MHO could (and would have to) establish its own office and send its own personnel to market its products." Plaintiffs' Corrected Memorandum of Law at p. 14. MHO responds that because plaintiff cannot show common ownership, a formal agency agreement, or that Afrimet has the power to bind MHO, no agency relationship can be inferred between MHO and Afrimet and thus, plaintiffs cannot rely upon § 301 to establish MHO's jurisdictional presence.

The exact nature of the relationship between Afrimet and MHO is complicated, to say the least. So, to fully understand the parties' respective positions, it is necessary to carefully examine the relationship between Afrimet and MHO as of February, 1987—the relevant time period. Before doing that, however, the court must address one procedural matter raised by MHO in its Reply Memorandum of Law filed March 6, 1989 ("Reply Memorandum II"). MHO "objects" to the "introduction" of the affidavit of Jean Depasse, a lawyer with the law firm of Oppenheimer Wolff & Donnelly, located in Brussels, Belgium, and asks the court to "disregard" both the Depasse affidavit and accompanying exhibits. Reply Memorandum of Law II at

p. 2-3.⁵ Plaintiffs submitted that affidavit in an attempt to address the court's concerns, expressed at oral argument, regarding the nature of the relationship between MHO and various other corporate entities.

One of MHO's objections to the Depasse affidavit can be readily dismissed; that is that the court should disregard Mr. Depasse's affidavit because it was not executed under oath. When plaintiffs submitted the Depasse affidavit to the court on February 13, 1989, they explained that because notary publics are not ordinarily used under Belgian law, Mr. Depasse was having a difficult time getting his affidavit notarized within the time frame directed by the court. Letter from Peter Vangsnes to Court (Feb. 10, 1989). Plaintiffs therefore timely submitted Mr. Depasse's affidavit, albeit not notarized. A notarized affidavit from Mr. Depasse was eventually provided to the court, however; and thus the court will not disregard Mr. Depasse's affidavit on that basis.

Several other objections raised by MHO are more troublesome though. One valid objection advanced by MHO is that the exhibits which are attached, to Mr. Depasse's affidavit, and upon which he so heavily relied, are not sworn or certified copies. Fed. R. Civ. P. 56(e) provides, in relevant part:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such

⁵Although not specifically styled as a motion to strike the affidavit of Mr. Depasse, clearly that is what MHO intended, and the court will consider MHO's objections as such. The court notes that the objections raised by MHO comply with the Second Circuit's holding that motions to strike must be made with adequate specificity in that MHO articulates the various paragraphs of Mr. Depasse's affidavit which it believes are improper. *DeCintio v. Westchester County Medical Center*, 821 F.2d 111, 114 n.3 (2d Cir.), cert. denied, ____ U.S. ____, 108 S.Ct. 455, 98 L.Ed.2d 395 (1987) (citing *Perma Research and Development Co. v., Singer Co.*, 410 F.2d 572, 579 (2d Cir. 1969)).

facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. *Sworn or certified copies of all paper or parts thereof referred to in an affidavit shall be attached thereto or served therewith.*

(emphasis added). It is undisputed that the documents attached to Mr. Depasse's affidavit are not certified copies. Nor is there any mention in his affidavit that the attached documents are true and accurate copies of the originals. Consequently, on these motions the court cannot consider the exhibits attached to the Depasse affidavit. *See also Cummings v. Roberts*, 628 F.2d 1065, 1068 (8th Cir. 1980) (medical records attached to affidavit, but which were not certified were not proper for the district court's consideration on summary judgment motion); *Nolla Morrell v. Riefkohl*, 651 F.Supp. 134, 139 (D. Puerto Rico 1986) (refusing to consider documents which were not accompanied by affidavits or a certification attesting to their validity); *Presley v. Carribean Seal*, 537 F.Supp. 956, 965 (S.D. Tex. 1982) (exhibit attached to defendant's summary judgment not considered because it lacked proper authentication, even though "there is probably no serious dispute as to the document's authenticity or the effect of its provisions. . . ."); *but see, Cinocca v. Baxter Laboratories, Inc.*, 400 F.Supp. 527, 530 (E.D. Okla. 1975) (uncertified documents considered by the court on summary judgment motion where plaintiff did not object to that defect).

The reason is clear. On a motion for summary judgment the court may only consider material which would be admitted at trial. Fed. R. Civ. P. 56(e); *see generally* 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil 2d § 2721 (1983). Documents which are not properly authenticated or identified would violate

the authentication and identification requirements set forth in Fed. R. Evid. 901.⁶

In preparing his affidavit, Mr. Depasse relied upon, among other things, the following documents:

The material issued by the Belgian National Register located in Brussels ("Service du Registre National des Personnes Morales") where all Belgian companies are required, pursuant to Belgian law, to file Annual Accounts on a yearly basis.

Depasse Affidavit (2/9/89) at par. 2(B). While those documents may satisfy the authentication and identification requirements of Rule 901 because apparently they are public records,⁷ it is impossible for the court to determine exactly which of the accompanying exhibits are the documents described in paragraph 2(B) of the Depasse affidavit. More important, however, is that insofar as the court is able to ascertain, there is no indication on *any* of those documents that they are from the Belgian National

⁶That rule states, in pertinent part:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Fed. R. Evid. 901(a).

⁷Rule 901 also provides "examples of authentication of identification conforming with the requirements of this rule," such as the following:

Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

Fed. R. Evid. 901(b)(7).

Register—"the public office where items of this nature are kept." Therefore, the court will not consider *any* of the exhibits attached to Mr. Depasse's affidavit. All of the averments made by Mr. Depasse are based upon information purportedly contained in the exhibits attached to his affidavit. Thus, because the court cannot properly consider those exhibits, Mr. Depasse's affidavit is meaningless and the court will not consider it either.

The court observes that even if the exhibits to Mr. Depasse's affidavit had complied with the procedural requirements of Rule 56(e), the court has serious reservations as to whether, in any event, it would have been able to consider significant portions of Mr. Depasse's affidavit. That is so because, as MHO pointed out, Mr. Depasse's affidavit appears to contain legal opinions and conclusions with respect to various corporate relationships which are at issue here.⁸ Such statements of ultimate facts or legal conclusions are inadmissible, and thus the court would have been forced to disregard that extraneous material. *A.L. Pickens Co. v. Youngstown Sheet & Tube Co.*, 650 F.2d 118, 121 (6th Cir. 1981) (quoting 6 Moore's Federal Practice, Part 2, par. 56.22[1] at 56-1316 (Supp. 1979)); cf. *United States v. Alessi*, 599 F.2d 513, 515 (2d Cir. 1979) (District court is free to disregard those parts of an affidavit which are not based upon personal knowledge and thus are inadmissible, but it may consider the

⁸For example, in his affidavit Mr. Depasse avers:

In light of the foregoing, we believe that the SG *de M*, which the Report mentions as being constituted in 1920 is in fact the "former SMG" recorded in the Belgian National Register as existing as of 1919. Thus, SGM can be regarded as the sole entity having the name of "Societe Generale des Minerais" at the time when the situation must be envisioned for our purposes, namely as of February, 1987.

other parts of such affidavit.) In addition to not considering the Depasse affidavit and accompanying exhibits, the court, as indicated at oral argument, is not considering the affidavit of Gaston Lancel executed on December 1, 1988 submitted by MHO.

To clarify, the court repeats that it is *not* considering the affidavit of Gaston Lancel dated December 1, 1988. Nor is it considering the affidavit of Jean Depasse and the accompanying exhibits consisting of the following: (1) the 1987 Annual Report of the Societe Generale de Belgique, (2) the Dun & Bradstreet reports, (3) correspondence from "CRFDOC" dated February 8, 1989, (4) a document purportedly obtained from the Belgium National Register regarding Societe Generale Des Minerais ("SGM"), (5) the SGM "Rapport De Gestion," (6) the MHO Annual Accounts, and (7) the SGM Annual Accounts. Nor is the court relying upon the organizational chart marked as exhibit 4 during the deposition of Mr. Lancel. Although that chart may support plaintiffs' position regarding the corporate inter-relationships at issue here, Mr. Lancel specifically testified that his memory was not refreshed by that chart, Lancel Deposition at p. 135; and plaintiffs have not indicated where else in the record, if at all, the information on that chart is substantiated. Therefore, the court cannot and will not consider that organizational chart.

The court further notes that it is the obligation of the parties and *not* the court to marshal the evidence and to present it to the court in a cohesive and accurate manner. The court is overburdened enough without having to read entire depositions and sort through various documents to ascertain what facts support a party's position; that is the job of counsel. It is especially important in a case such as this involving an extremely complex set of facts and raising the issue of personal jurisdiction, which by its very na-

ture requires the court to make a detailed factual inquiry.

Although counsel did, for the most part, refer to relevant portions of the record to support their factual allegations,⁹ a careful examination of those cites indicates that both parties took some liberties, in presenting their respective positions. While the court recognizes that a lawyer must zealously represent his or her client,¹⁰ that does not excuse the making of factual allegations which are not always substantiated by the record.

Thus, insofar as certain factual allegations were not substantiated in the record where the parties indicated that they were supposed to be, or where the proof was mischaracterized by the parties, the court did not consider such allegations. Having made those observations, the court will now turn to an examination of the facts, in light of the case law discussed above.

MHO is a Belgium corporation, which processes and sells nonferrous metals. Among MHO's customers is Afrimet, a sales organization engaged in the business of selling various metal products, such as those processed by MHO, to customers throughout the continental United States and Canada. Kielty Deposition at pp. 10 and 22-23. Afrimet's office is in New York City and it transacts all of its business from that office. Kielty Deposition at p. 56. Plaintiffs' employer, Valeron, purportedly purchased cobalt products from Afrimet.

In an effort to establish a valid inference of agency, as described by the *Frummer* Court, plaintiffs assert that

⁹Counsel obviously failed to cite to the record for certain significant allegations, however, as is evidenced by the court's specific direction to counsel at oral argument to provide the court with additional briefing citing "where in the record" the various corporate relationships involved here are explained. Transcript (1/17/89) at p. 2-3.

¹⁰Canon 7 of the Code of Professional Responsibility provides that a lawyer should represent his client zealously within the bounds of the law. N.Y. Code of Prof. Resp. EC 7-1 (McKinney 1975).

there is a common ownership link between MHO and Afrimet. In particular, plaintiffs contend that MHO and Afrimet are two subsidiaries of a Societe Generale de Belgique ("SGB"); and that MHO, through two other corporate entities, Societe Generale des Minerais ("SGM") and Sogem Holdings Limited ("Sogem"), have an ownership interest in Afrimet. The record as it is now constituted, however, simply does not support a finding of common ownership—indirect or otherwise. While it is true that MHO previously had "a little bit more than 30%" interest in Afrimet, in 1985 MHO sold that interest. *Id.* Thus, in February, 1987, the time frame with which the court is concerned, MHO had absolutely no direct ownership interest in Afrimet.

In addition, the record before this court does not support a finding that MHO had an indirect ownership interest in Afrimet in February of 1987. Afrimet is "indirectly a part of SGB, which has "some 1246 participants. . . ." de Decker Deposition at p. 77. When specifically asked whether MHO is also a part of SGB, Mr. Lancel replied, "[t]hat is the reputation. . . ." Lancel Deposition at p. 87. Based upon that limited proof, the court cannot conclude that plaintiffs have made a *prima facie* showing of common ownership.

Even assuming *arguendo* that there is a common ownership link between MHO and Afrimet, nonetheless the court is not convinced that plaintiffs have made a *prima facie* showing that MHO is doing business in New York through Afrimet. That is so because plaintiffs have simply failed to come forth with sufficient verified facts to support a valid inference of an agency relationship between MHO and Afrimet.

Plaintiffs have not established that Afrimet is financially dependent upon MHO. Nor have plaintiffs shown that MHO is involved in the selection and assignment of Afrimet's executive personnel. There is proof that at var-

ious times Afrimet and MHO have had common members of their Boards of Directors, but none of those board members were simultaneously involved in the active management of both MHO and Afrimet. Lancel Deposition at p. 87-89. Moreover, there is no proof showing that those board members, or, for that matter, any members of MHO's Board of Directors, were ever involved in employment decisions pertaining to Afrimet's executive personnel.

Although MHO does apparently exercise some control over the marketing of its products by Afrimet, it does not exercise the control to the vast extent plaintiffs would have this court believe. Mr. Kielty testified that MHO does give input to Afrimet regarding how MHO's products are to be handled in the market. Kielty Deposition at p. 47. He further testified that MHO (through Mr. de Decker) gives Afrimet some advice regarding the direction of the market for MHO products, after Afrimet has given MHO its impression of the marketplace. *Id.* at p. 61. Finally, the record supports plaintiffs' contention that Afrimet must consult with MHO prior to entering into any long-term contracts with customers. *Id.* at p. 68-69.

Plaintiffs' assertion, however, that "MHO retains the right to control the terms of sales made by Afrimet on its behalf," is not substantiated by the record as cited by plaintiffs. Plaintiffs' Corrected Memorandum of Law at p. 16. Plaintiff's assertion that "Afrimet is required to report regularly to MHO on its activities" is similarly deficient. What the record as cited by plaintiffs does show is that *SGM* retains the right to control the terms of sales made by Afrimet on behalf of MHO and that Afrimet must regularly report to *SGM* on its sales activities. Kielty Affidavit, Ex. B thereto. Although it may be, as plaintiffs contend, that MHO has a 100% ownership interest in *SGM*, which in turn allegedly has some ownership interest in Afrimet, and that given that alleged ownership link,

SGM's rights and responsibilities could be fairly attributable to MHO, the court simply cannot make such an inference based upon the state of the record presently before it. That alleged common ownership is not supported by the proof which the court has considered on these motions. Thus, in light of the proof which the court could properly consider, the "control over marketing" factor weighs more heavily in favor of MHO.

There is one other factor which cannot be overlooked; and, in the court's view, that factor most strongly supports plaintiffs' jurisdictional theory. Specifically, it appears that Afrimet does all the business which MHO could do were it in New York by its own officials. See *Gelfand*, 385 F.2d at 121. With respect to Afrimet's sales of MHO products, several important facts emerge from the record. The first is that pursuant to an agreement between SGM and Afrimet, Afrimet obtained the "exclusive sales right for M.H.-O.'s cobalt special products i.e., powders oxides and salts." Kielty Affidavit, Ex. B thereto. That exclusive sales right was subsequently extended for "an indefinite period of time." *Id.* Because there is nothing in the record to the contrary, the court presumes that as of February, 1987, Afrimet still maintained the exclusive right to sell certain of MHO's products within the United States. In addition, MHO considered Afrimet to be "the best purchaser" in the United States for certain of MHO's products. de Decker Deposition at p. 14. Consistent with the terms of that agreement, Mr. de Decker testified that Afrimet is the *only* purchaser in the United States for certain MHO products. *Id.*

Based upon those facts, plaintiffs contend that the present case is controlled by the Second Circuit's decision in *Gelfand*. More particularly, plaintiffs contend that the sales services provided by Afrimet are sufficiently important to MHO that if Afrimet did not market certain of

MHO's products in the United States and Canada, MHO would undoubtedly undertake to perform that sales function itself. In that regard, plaintiffs point to the fact that during 1987 MHO derived between 800-900 million Belgian francs (21 to 24 million dollars)¹¹ in revenue from sales to Afrimet. de Decker Deposition at p. 47.

There are two significant distinctions between *Gelfand* and the present case, however. The first is that in *Gelfand* the New York representative had the power to contractually bind the foreign defendant; these plaintiffs have not offered any proof, though, that the same is true here. In fact, the proof is arguably to the contrary. When asked whether he considered Afrimet to be a sales representative for MHO, Mr. Lancel responded, "No." Lancel Deposition at p. 104. Mr. Lancel explained that in his view a sales representative is "[s]omeone who can act on my behalf and who can commit myself to something." *Id.*

Second, and intertwined with the first distinction, is that the record does not support a finding that Afrimet is providing services to MHO beyond "mere solicitation." And, as the Court of Appeals expressly stated in *Delagi*, "[m]ere sales of a manufacturer's product in New York, *however substantial*, have never made the foreign corporate manufacturer amenable to suit in this jurisdiction." 29 N.Y.2d at 433, 328 N.Y.S.2d at 657 (emphasis added). Given those factual distinctions, the court is not convinced that this case is sufficiently analogous to *Gelfand*

¹¹According to plaintiffs:

Based on the current exchange rate of approximately 37 Belgian francs to the dollar, MHO's revenue from sales to Afrimet-Indussa in 1987 was approximately 21 to 24 Million Dollars.

Plaintiffs' Corrected Memorandum of Law at p. 3 n.2. MHO did not dispute that calculation, and thus the court takes judicial notice of that fact pursuant to Fed. R. Evid. 201.

to warrant a finding that MHO is doing business in New York through Afrimet.

In sum, although it appears that Afrimet engages in solicitation in New York on behalf of MHO, there are not sufficient additional facts before the court on the record as it is not constituted to warrant a valid inference of an agency relationship between MHO and Afrimet. To review, there is no showing of common ownership of MHO and Afrimet; there is certainly no formal agency agreement; there is not proof that Afrimet is authorized to contractually bind MHO; and MHO does not have any of the typical indicia of doing business in New York, such as an office, real estate, or personnel that regularly work in New York. Consequently, the court cannot say that MHO, as a matter of law, is doing business in New York for purposes of §301; and therefore, this aspect of MHO's motion for summary judgment must be granted.

B. §302(a)(3)(i): "Substantial Revenue"

The court's inquiry into the jurisdictional basis cannot end with just a consideration of §301, however. Plaintiffs also rely upon New York's long-arm jurisdiction statute which states, in relevant part:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, . . . who in person or through an agent: . . .

3. commits a tortious act without the state causing injury to person or property within the state, . . . if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or *derives substantial revenue*

from goods used or consumed or services rendered, in the state,

N.Y. Civ. Prac. L. & R. §302(a)(3)(i) (McKinney 1972) (emphasis added). Thus, by the very terms of that statute, there are three elements which must be present before a court may properly exercise personal jurisdiction over a defendant thereunder: (1) the defendant must have committed a tortious act without the state that (2) causes injury to a person or property within the state so long as one of the three other conditions set forth in subdivision (i) is also met.

Here, the only disputed issue is whether MHO derives substantial revenue from goods used or consumed in New York. MHO contends that it does not derive such revenue because prior to 1985, which MHO claims is the relevant time frame, it derived absolutely no revenue from sales of cobalt-containing products, which allegedly injured plaintiffs, because at that time MHO was not in the business of selling such products. MHO also contends that plaintiffs cannot establish jurisdiction over it under this statute because conspicuously absent from the record is any proof that "MHO derived substantial revenue from products used or consumed in *New York state* during the applicable time period." . . . Defendant's Reply Memorandum of Law I at p. 28 (emphasis added). Plaintiffs counter that the evidence supports their position that MHO derived substantial revenue within the meaning of §302 (a)(3)(i).

Before considering the merits of the parties' respective positions, it is necessary to address the issue of what is the appropriate time frame for examining the jurisdictional facts under §302 (a)(3)(i). Initially, without citing any case authority, MHO asserted that the applicable time frame is prior to 1982 when plaintiffs' employer closed its Syracuse manufacturing plant; and not February, 1987 when the complaint was filed. In particular, MHO reasoned:

After the plant closed, no action on the part of MHO could have resulted in any injury to the plaintiffs and no revenues derived by MHO can be considered relevant to the foreseeability of such injury.

Defendant's Reply Memorandum of Law I at 26. By that language, MHO seems to be suggesting that the court should not look at post-1982 revenue in determining whether jurisdiction is proper under §302(a)(3)(i), because MHO was not deriving any revenue from the sale of cobalt products within New York State when the injuries complained of allegedly occurred. At least one New York court has recognized, however, that under §302(a)(3)(ii), there does not need to be any connection between the tortious act and the derivation of substantial revenue. *Vecchio v. S & T Mfg. Co.*, 601 F.Supp. 55, 57 (E.D.N.Y. 1984) (citing *Gonzales v. Harris Calorific Co.*, 64 Misc.2d 287, 315 N.Y.S.2d 51 (Sup. Ct.), *aff'd*, 35 A.D.2d 720, 315 N.Y.S.2d 815 (2d Dep't 1970))¹²; *see also* N.Y. Civ. Prac. L. & R. C302:23 (McKinney 1972) ("[I]t is not required that the cause of action arise in any way from the revenue earned in New York."); D. Siegel, *New York Practice* §88 (1978) ("The cause of action sued on need not be related to those New York activities, however.") Thus, the fact that MHO did not derive substantial revenue when the alleged tortious act occurred is irrelevant, and does not require this court to examine the substantial revenue issue based upon facts as they existed prior to the filing of plaintiffs' complaint.

¹²Although *Vecchio* involved §302(a)(3)(ii), it is not rendered inapplicable simply because of that. Both subsections 302(a)(3)(i) and (ii) require a showing that defendant derives substantial revenue. The latter section is broader, however, in that such revenue may be from either interstate or international commerce.

MHO also urges this court to depart from the "time of suit" analysis suggested by plaintiffs because MHO believes such an analysis would violate its constitutional right to due process. In particular, MHO contends that "[i]f MHO's post-1982 activities are considered under this Court's CPLR 302 analysis, the defendant will have been denied the opportunity to structure its primary conduct with some minimum assurance as to where that conduct will and will not render it liable to suit." Letter from James Lee to Court (Jan. 27, 1989).

MHO misinterprets the purpose of the foreseeability element of due process, however. What MHO fails to recognize is that the purpose of the foreseeability requirement is *not* to immunize a defendant from its past activity; rather, it is merely to assure that contacts are sufficient to render it reasonable, *i.e.* not overly burdensome, to require a defendant to defend itself in a lawsuit brought in that forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490, ____ (1980) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed.2d 95 (1945)). The Supreme Court in *World-Wide Volkswagen* held that once a party "purposefully avails itself of the privilege of conducting activity within the forum State," due process is not violated by subjecting that party to suit in the forum state. *Id.* at 297, 100 S.Ct. at 546, 62 L.Ed.2d at ____ (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, ____ (1958)). Here, MHO purposefully availed itself of the privilege of conducting business within New York State in 1985 when it began selling certain products, including cobalt-containing metals, to Afrimet. The court is therefore not persuaded that examination of the jurisdictional facts as they existed when the complaint was filed in February, 1987 would be violative of MHO's due process rights.

Additionally, as previously discussed, it is clear the under § 301 the determination of whether personal jurisdiction is proper is made based upon the facts at the time the complaint is filed. That approach seems to be echoed in the comments to § 302 authored by Joseph M. McLaughlin. Specifically, albeit in a slightly different context, Judge McLaughlin stated that, “[j]urisdiction depends on the facts that exist at the time of service . . .” N.Y. Civ. Prac. L. & R. C302:5 (1975) (McKinney Supp. 1989).

Finally, it is interesting to observe that § 302(a)(3)(i) expressly states derives; it does not stated derived, in the past tense. Although a rather simplistic observation, that too lends credence to the notion that the personal jurisdiction inquiry should be based on the facts at the time the action is commenced. For all of the foregoing reasons, the court will examine the jurisdictional facts in the record pertaining to MHO’s revenue as of the date the complaint was filed—February, 1987—to determine whether it can properly exercise personal jurisdiction over MHO pursuant to § 302(a)(3)(i).

To demonstrate that MHO was deriving substantial revenue as of February 1987, plaintiffs rely upon the deposition of Mr. de Decker, a member of MHO’s sales department. He estimated that during 1987 the total volume of sales by MHO to Afrimet was “somewhere between 800-900 million” Belgian francs. de Decker Deposition at p. 47. As previously mentioned, that amount is roughly equivalent to 20 to 24 million American dollars.

According to Mr. de Decker, that amount represented approximately 1% of MHO’s total sales revenue during 1987. *Id.* at p. 47-48. Plaintiffs also rely upon the fact that one of Afrimet’s Group Vice-Presidents, Edward Kielty, testified that Afrimet sells products which it purchases from MHO within New York State. Kielty Deposition at p. 26. Mr. Kielty specifically testified that “[t]here

are a number of buyers in the State of New York. . . ." *Id.* at p. 27.

MHO contends that plaintiffs cannot rely upon § 302(a)(3)(i) because they have not shown what percentage of MHO's revenues were derived from goods used or consumed in *New York State*. MHO, in support of its position, relies upon two cases. First, it relies upon *Allen v. Auto Specialties Mfg. Co.*, 45 A.D.2d 331, 357 N.Y.S.2d 547 (3rd Dep't 1974), wherein the Appellate Division remitted the matter to the lower court for a hearing on the substantial revenue issue because there was "no evidence in the record as to the percentage of defendant's business derived from interstate or international commerce." *Id.* at 550. Second, MHO relies upon *Cwick v. City of Rochester*, 107 A.D.2d 1077, 486 N.Y.S.2d 549 (4th Dep't 1985). In *Cwick*, the Appellate Division affirmed Special Term's holding that no personal jurisdiction existed under § 302(a)(3)(ii)¹³ because there was no proof contradicting third-party defendant's averments that he derived *no* revenue from interstate commerce. *Id.* at _____, 486 N.Y.S.2d at 550.

Plaintiffs rely solely upon *Allen v. Canadian General Electric Co.*, 65 A.D.2d 39, 410 N.Y.S.2d 707 (3rd Dep't 1978), *aff'd on the opin. below*, 50 N.Y.2d 935, 431 N.Y.S.2d 526 (1980). In *Allen* the Third Department held that the defendant foreign corporation which earned 1% of its revenue within New York State, representing nine million dollars, satisfied the substantial revenue requirement of § 302(a)(3)(i). The Appellate Division opined, "[i]t would be difficult to convince an economist that sales of approximately \$9 million were not substantial regardless of their ratio to total sales." 65 A.D.2d at _____,

¹³ Once again, as discussed in footnote 12, these cases are not inapplicable because they involve a different subsection of § 302(a) than that relied upon by the plaintiffs herein.

410 N.Y.S.2d at 709. The Appellate Division went on to reason:

To *limit* the issue of jurisdiction in all cases to a comparison of the ratio of sales in individual states to total sales would, in all probability, insulate a large corporation, such as defendant, from possible liability in most individual states of the union.

Id. (emphasis in original). Thus, as one Commentator has observed, after *Allen*, “[i]f the defendant’s New York income is substantial in either an absolute sense (i.e., a large sum of money) or in a relative sense (i.e., a large proportion of its revenues), it should be sufficient to support long-arm jurisdiction.” N.Y. Civ. Prac. L. & R. C302:23 (1979) (McKinney Supp. 1989).

There is no doubt that *Allen* would be extremely beneficial to plaintiffs *if* they had the requisite sales figures. As MHO strenuously pointed out, however, plaintiffs have “utterly” failed to come forth with any proof, even after extensive discovery, regarding what percentage of MHO’s revenues were generated from goods used or consumed *within this State*. Defendant’s Reply Memorandum of Law I at p. 26. Although there is proof before the court that Afrimet sold the products processed by MHO within New York State there is absolutely no proof of the amount of those sales—either in percentage terms or dollar amount. Indeed, given Afrimet’s broad market—the continental United States and Canada—it is possible that MHO does not derive substantial revenue from the sale of its products within this State. Therefore, because plaintiffs have failed to establish the existence of an essential element of personal jurisdiction under § 302(a)(3)(i), there is no “genuine issue of material fact,” and thus MHO is entitled to summary judgment as a matter of law on this issue. *See, Celotex Corp. v. Catrett*, 477, U.S.

317, ____, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265, ____ (1986). *Accord, Birmingham Fire Ins. Co. v. KOA Fire & Marine Ins. Co.*, 572 F.Supp. 962, 968 (S.D.N.Y. 1983) (No showing of substantial revenue derived from business within New York State where there was no showing by the third-party plaintiff that the third-party defendant supplied services in the state, and because there was no evidence that the third-party defendant garnered substantial revenue from New York related business.)

Accordingly, the motion for summary judgment on the issue of personal jurisdiction made by defendant, Metallurgie-Hoboken-Overpelt S.A., is granted in all respects; and necessarily, the cross-motion for summary judgment by plaintiffs on that same issue is denied in all respects.

DATED: July 28, 1989
Syracuse, NY

NEAL P. McCURN
Chief, U.S. District Judge

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To: _____ Date May 17, 1983

Xerox Corporation
800 Phillips Road Building 218-08S
Webster, NY 14580

Attn: Mr. Fred Lathom

Your Order No. B-5669817

Our Order No. 40900

Gentlemen:

We are pleased to confirm our sale to you, and your purchase from us, of the following merchandise. Subject to the terms and conditions stated herein, and our standard conditions of sale as set forth on the reverse side of this contract which conditions are made a part hereof.

Product: Selenium Xerox Corp.
Five Nines Pure (99.999%) Xerox
Part NR. 9104280000

Quantity: Approximately 907 Kgs. Packed in Glass

Price: U.S. Dollars 29.76 Per Kg. Ex
Hoboken Works.
Plus .85 Cents Per Kg. for Glass
Packing

Packing: As Per Xerox Specifications

Marks: Each Drum to be Marked as Per Xerox
Numbering System

Terms: Net 30 Days From Date of Invoice

Shipments: In-Plant Jun 20th by Air, Through
Air Compac.

Final Destination:	3 Copies of Cert of Analysis
Xerox Corporation	To: Anil Mukerji
800 Phillips Road	800 Phillips Road
Building 218	Building 218-08S
Webster, NY 14580	Webster, NY 14580

Invoice To: Xerox Corporation, Accounts Payable,
PO. Box 301, Webster, NY 14580

Interest at the rate of per annum charged on all past
due accounts, this interest rate to be increased or de-
creased as the case may be. The increase or decrease being
equal to the increase or decrease of the current prime rate
published in the Wall Street Journal under the heading
"prime rate".

We thank you for this business. Please sign and return the duplicate copy for our files.

Accepted By: _____

Very Truly Yours
Afrimet/Indussa, Inc.

Title _____

Date _____

TERMS AND CONDITIONS

1. **AGREEMENT OF SALE ACCEPTANCE:** Any acceptance contained herein is expressly made conditional on Buyers's assent to any terms contained herein that are additional to or different from those proposed by Buyer in its purchase order and, hence any terms and provisions of Buyer's purchase order which are inconsistent with the terms and conditions hereof shall not be binding on the Seller. Unless Buyer shall notify Seller in writing to the contrary as soon as practicable after receipt hereof acceptance of the terms and conditions hereof by Buyer shall be deemed made and, in the absence of such notification the sale and shipment by the Seller of the goods covered hereby shall be conclusively deemed to be subject to the terms and conditions hereof.

2. **ENTIRE CONTRACT:** This contract constitutes the final and entire agreement between Seller and Buyer and any prior or contemporaneous understandings of agreements, oral or written are merged herein.

3. **PRICES:** Any increase in duties (if duties are included in the selling price) and any local, state and federal tax, or other government charge upon the production or sale or import or transportation of the merchandise which becomes effective during the life of this contract may be added by the Seller to the price herein provided.

4. **PAYMENT:** The specific terms of payment are as specific in writing by Seller.

In case of non-payment at one of the days of maturity, the full amount already invoiced becomes due and Seller reserves the right to cancel further supplies against this contract. In case of non-payment or late payment, the amounts due will, with good right and without any summons and, and as from the maturity date, bear interest at a rate of 3 percentage points higher than the one month average prime rate in force at the maturity date of the invoice, as published in the "Wall Street Journal" under the heading "Prime Rate." If any invoice remains unpaid in whole or in part 15 days after seller has made a written demand for payment, then seller reserves the right, in order to cover his additional expenses caused by Buyer's breach, to increase by 10% the unpaid balance on the overdue invoice with a minimum increase of U.S. \$250 and a maximum increase of U.S. \$5,000, which shall be in addition to the interest due as provided above.

5. **DELIVERY:** Seller's terms of delivery are not guaranteed unless expressly stipulated in Seller confirmation. Absent such stipulation, dates of delivery are estimates only of an indicative nature. They shall not be invoked in support of any claim.

If Buyer fails to take delivery of the goods at the time specified in the contract, Seller shall have the right to, at his option, after notifying Buyer, cancel the portion of the contract applicable to that contractual delivery without prejudice to damages and interest or in lieu of delivery, store the goods in a warehouse of his choice at Buyer's expense and risk and request payment as per contractual terms.

6. **INSPECTION/ACCEPTANCE:** Inspection (including weighing and sampling operation) and acceptance of

goods and packing, must always be finally carried out at manufacturer's facilities before dispatch. Buyer shall have the opportunity of being represented at his own expense after giving Seller reasonable notice of his intention, if he should not avail himself of the opportunity, it will be assumed that he has waived his right of inspection and accepted the goods and packing. Only for hidden defects will claims be accepted from Buyer once the hereabove inspection operations have been carried out.

To be valid, each claim for hidden defects shall be introduced within thirty (30) days following delivery of the goods.

7. DISPATCH: Dispatch and marking instructions as well as call of instruction must reach seller in due time before the fixed dispatched date. All additional costs due to non compliance with this term shall be at Buyer's expense.

8. FORCE MAJEURE: In the event of governmental action or acts of the authorities, war, not, strike, lockout, fire, explosion, accident to plants, shortage of raw material, cataclysm, lack of freight facilities, or any causes whatsoever or event, whether foreseeable or not, beyond any reasonable control of the parties and preventing either Seller from placing the goods at the disposal of the Buyer or Buyer from taking delivery of same, the contract shall be suspended during the duration of said hindrance. The failing party shall notify the other party in writing as soon as is reasonably possible after the commencement of such hindrance, setting forth the full particulars thereof, and shall remedy such hindrance with all reasonable dispatch and shall promptly give written notice to the other party of the cessation of such hindrance. If such hindrance lasts for more than three months, then either party shall have the right to terminate his obligation without prior notice or indemnity for any quantity for which delivery has been hindered by reason of force majeure.

9. **CANCELLATION OR TERMINATION:** This contract may not be terminated by the Buyer in whole or in part without Seller's written consent and payment to Seller of a sum sufficient to cover the cancellation fee charged Seller by his suppliers covering their costs of working up and manufacturing the goods which are the subject of this contract, together with all incidental and consequent damages and expenses which Seller may suffer or incur. When any grounds for insecurity arise with respect to Buyer's performance. Seller may demand in writing adequate assurance of due performance and, until Seller receives such assurance in form satisfactory to Seller, Seller may at his option suspend any performance for which he has not already been paid.

In the event Buyer defaults on the payment of goods delivered under this agreement, Seller shall have the right to: (a) enforce payment of any balances due together with damages and interest as provided in clause (4) above; (b) cancel the agreement; (c) cancel or suspend any other outstanding agreement for the delivery of goods to Buyer; (d) withhold any undelivered goods; (e) stop delivery from Seller to Buyer of any goods in the possession of a carrier or other bailee; (f) recover from Buyer all of Seller's incidental and consequential damages; (g) invoke any other remedy Seller's may have by law or under the terms of this agreement.

10. **WARRANTY:** Seller warrants to Buyer that Product delivered under this contract conforms to Seller's specifications for the Product. No other warranty of Product specifications is implied or intended in his contract unless noted on the reverse side hereof and made a part thereof. Seller's warranty is limited to replacement or credit at Seller's option for Product not conforming to said specification. THIS WARRANTY SHALL BE IN LIEU OF ALL OTHER WARRANTIES EXPRESS, STATUTORY OR IMPLIED, INCLUD-

ING WITHOUT LIMITATION, TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND OF ALL OTHER OBLIGATIONS OR LIABILITIES OR SELLER. In no event shall Seller be liable for special or consequential damages for failure to perform any obligation undertaken or imposed pursuant to this Contract. No claim concerning the quality of dispatched goods shall give the Buyer the right to cancel this contract automatically, in whole or in part, so long as we replace, within a reasonable time, any goods we acknowledge to be non-conforming.

11. **WAIVERS:** No waiver by either party at any time, expressed or implied, of any breach of any provision of this Contract shall be deemed a waiver of a breach of any other provision. Failure of either party to complain of any act or omission on the part of the other, no matter how long the same may continue, shall not be deemed to be a waiver of any of its rights hereunder. If action by either party shall require the consent or the approval of the other, such consent to or approval of such action on any one occasion shall not be deemed a consent to or approval of said action in any subsequent occasion, or a consent to or approval of any other action.

12. **WARNING:** Buyer is hereby informed that this product may have been classified as a hazardous substance. If such is the case Buyer has been provided a Material Safety Data Sheet (MSDS) which includes information regarding certain hazards involved in the use of the product, first aid measures, precautions, and procedures and recommended personnel protective equipment.

Owing to its industrial and commercial activities. Buyer acknowledges it has sufficient knowledge and experience to properly handle, store, condition and use the product and agrees to observe all general and personal preventive

and safety measures required by applicable laws, regulations and instructions, and to provide Buyer's employees and customers with appropriate information regarding the hazards of this product. In the event Buyer fails to do so and, as a result, claims of damage or injury are made against Seller or manufacturer of Seller's product by an employee of Buyer or a user of Buyer's product, then in such event Buyer agrees to hold Seller and the manufacturer of Seller's product harmless from any such claims and subsequent defense costs.

In the event Buyer alters the physical state, appearance, form, nature or property of the product by compounding, blending, dissolving, alloying or otherwise mixing it with one or more other substances to form a new product, under circumstances and procedures over which Seller has no control, then Buyer agrees to be responsible for the new product it has made and all elements thereof and to hold harmless, including defense costs, the Seller and the manufacturer of Seller's product from any claims or damage or injury the new product or any of its elements allegedly caused any employee of Buyer or user of the new product.

13. **GOVERNING LAW:** The interpretation and performance of this contract shall be in accordance with and controlled by the laws of the State of New York.

14. **ARBITRATION • JURISDICTION:** Any dispute under the present contract shall be referred to arbitration using the rules of the "American Arbitration Society" by one or several arbitrators appointed according to said rules. However the actions relative to invoice recovery may be brought before any court having jurisdiction.



AFRIMET-INDUSSA INC.
1212 Avenue of the Americas

NEW YORK, N.Y. 10036
U. S. A.

TRUCKING:

The container shall be suitable for road transport and put by the shipping company at port of destination directly on a free under carriage at receiver's disposal for trucking from port to inland destination. The B/L will bear the mention : "If container is transported to final destination on a flat bed truck it is requested that unloading end of container be flush with tail of truck".

Trucker must notify customer before delivery.

WARNING:

Buyer is hereby informed that this product is considered as a hazardous substance. Buyer has been provided a Material Safety Data Sheet (MSDS) which includes information regarding certain hazards involved in the use of the product, first aid measures, precautions and procedures and recommended personnel protective equipment.

Owing to its industrial and commercial activities, Buyer acknowledges it has sufficient knowledge and experience to properly handle, store, condition and use the product and agrees to observe all general and personal preventive and safety measures required by

applicable laws, regulations and instructions, and to provide Buyer's employees and customers with appropriate information regarding the hazards of the product. In the event Buyer fails to do so and as a result claims of damage or injury are made against Seller or the manufacturer of Seller's product by an employee of Buyer or a user of Buyer's product, then in such event Buyer agrees to hold Seller and the manufacturer of Seller's product harmless from any such claims and the costs of defense.

In the event Buyer alters the physical state, appearances form, nature of property of the product by compounding, blending, dissolving, alloying or otherwise mixing it with one or more other substances to form a new product under circumstances and procedures over which Seller has no control, then Buyer agrees to be responsible for the new product it has made and all elements thereof and to hold harmless, the Seller and the manufacturer of Seller's product from any claims or damage or injury the new product or any of its elements allegedly caused any employee of Buyer or user of the new product and the costs of defending against such claims.

GENERAL CONDITIONS:

Unless otherwise stated in our particular conditions of sale any sale shall be governed by our general terms and conditions of sale printed overleaf.

31/01/1986

line illegible

GENERAL TERMS AND CONDITIONS OF SALE

1.) *SALES*

This sale is made only upon the terms and conditions set forth on the face and reverse side of our offers, invoices as well as of our sales contracts and their enclosures and any different terms and conditions i.e. those printed on any document received from the buyer, are hereby excluded unless expressly accepted by us in writing.

For the interpretations of commercial terms, reference shall be made to the "International Rules for the Interpretation of Trade Terms" fixed by INCOTERMS 1953 of the International Chamber of Commerce, as well as by the additions and revisions applicable at the time of the conclusion of the agreement.

2.) *PRICES*

Any increase in duties (if duties are included in the selling price) and any local, state and Federal tax, or other Government charge upon the production or sale or import or transportation of the merchandise which becomes effective during the life of this contract may be added by us to the price herein provided.

3.) *PAYMENT*

In case of non payment at one of the days of maturity, the full amount already invoiced becomes due and we reserve the right to cancel further supplies against this contract.

In case of non-payment or late payment, the amounts due will, with good right and without any summons and as from the maturity date, bear interest at a rate of 3 percentage points higher than the one month average Interest rate in force at the maturity date of the invoice, for the debt's currency as appearing in the invoice. Such average interest rate is published in financial newspapers, among others "The Financial Times", under the item "Euro-currency interest rates".

If any invoice remains unpaid in whole or in part 15 days after we have made a written demand for payment, then we reserve the right, in order to cover our additional expenses caused by buyer's breach, to increase by 10 % the unpaid balance on the overdue invoice with a minimum increase of U.S. \$200,—and a maximum increase of U.S. \$5,000,—which shall be in addition to the interest due as provided above.

4.) *DELIVERY*

Our terms or delivery are not guaranteed unless expressly stipulated in our confirmation. Absent such stipulation, dates of delivery are estimates only of an indicative nature. They shall not be invoked in support of any claim.

If buyer fails to take delivery of the goods at the time specified in the contract, we shall have the right to, at our option, after notifying buyer, cancel the portion of the contract applicable to that contractual delivery without prejudice to damages and interest or in lieu of delivery, store the goods in a warehouse of our choice at buyer's expense and risk and request payment as per contractual terms.

5.) *INSPECTION/ACCEPTANCE*

Inspection (including weighing and sampling operations) and acceptance of goods and packing, must always be finally carried out at sellers facilities before despatch. Buyer shall have opportunity of being represented at his own expense after giving seller reasonable notice of his intention. If he should not avail himself of the opportunity, he will be deemed to have waived his right of inspection and accepted the goods and packing. Only for hidden defects will claims be accepted from buyer once the hereabove inspection operations have been carried out.

To be valid, each claim for hidden defects shall be introduced within thirty (30) days following delivery of the goods.

6.) *DESPATCH*

Despatch and marking instructions as well as call off instructions must reach us in due time before the fixed despatch date. All additional costs due to non compliance with this term shall be at buyer's expense.

7.) *FORCE MAJEURE*

In the event of governmental action or acts or the authorities, war, riot, strike, lock-out, fire, explosion, accident to plants, shortage of raw materials, cataclysm, lack of freight facilities, or any other causes whatsoever or event, whether foreseeable or not, beyond any reasonable control of the parties and preventing either seller from placing the goods at the disposal of the buyer or buyer from taking de-

livery of same, the contract shall be suspended during the duration of said hindrance. If such hindrance lasts for more than three months then either party shall have the right to terminate his obligation without prior notice or indemnity for any quantity for which delivery has been hindered by reason of force majeure.

8.) *CANCELLATION OR TERMINATION*

This contract may not be terminated by the buyer in whole or in part without our written consent and payment to us or a sum efficient to cover the cancellation fee charged us by our suppliers covering their costs of working up and manufacturing the goods which are the subject of this contract, together with all incidental and consequent damages and expenses which we may suffer or incur.

When any grounds for insecurity arise with respect to buyer's performance, we may demand in writing adequate assurance of due performance and until we receive such assurance in form satisfactory to us we may at our option suspend any performance for which we have not already been paid.

In the event buyer defaults on the payment of any goods delivered under this agreement, we shall have the right to:

- a.) enforce payment of any balances due together with damages and interest provided in clause (3) above;
- b.) cancel the agreement;

- c.) cancel or suspend any other outstanding agreement for the delivery of goods to buyer;
- d.) withhold any undelivered goods;
- e.) stop delivery from us to buyer of any goods in the possession of a carrier or other bailee;
- f.) recover from buyer all of our incidental and consequential damages;
- g.) Invoke any other remedy we may have by law or under the terms of this agreement.

9.) *LIABILITY*

Seller's liability shall be expressly restricted in any case to the contractual value of the goods in respect of which damages are claimed. No claim concerning the quality of despatched goods shall give the buyer the right to cancel this contract automatically, in whole or in part, so long as we replace, within a reasonable time, any goods we acknowledge to be non conforming.

10.) *JURISDICTION*

Any dispute under the present contract shall be referred to arbitration according to the "Rules of Conciliation and arbitration of the International Chamber of Commerce" by one or several arbitrators appointed according to said rules.

Belgian law solely is to apply.

However the actions relative to invoice recovery will be brought before any court having jurisdiction.